No. 03-15955

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONNIE A. NAGRAMPA,

Plaintiff-Appellant,

vs.

MAILCOUPS, INC.; THE AMERICAN ARBITRATION ASSOCIATION; AND DOES 1-25, INCLUSIVE,

Defendants-Appellees.

Appeal from the U.S. District Court for the Northern District of California
Case No. C03-0208-MJJ ARB
Honorable Martin J. Jenkins

PETITION OF APPELLANT FOR REHEARING AND SUGGESTION FOR HEARING *EN BANC*

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SUMMARY OF ARGUMENT

This Court should grant rehearing or a hearing *en banc* for two reasons. First, the panel decision holding that an arbitrator must decide whether a company's mandatory arbitration clause is unconscionable conflicts with at least six of this Court's decisions holding that a court makes this determination. *See Ticknor v. Choice Hotels, Int'l, Inc.*, 265 F.3d 931, 940 (9th Cir. 2001), *cert. denied*, 534 U.S. 1133 (2002); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir.), *cert. denied*, 535 U.S. 1112 (2002); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 783-84 (9th Cir. 2002); *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171-72 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004); *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1105-06 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004).

The panel held that these prior decisions either were not correctly decided because they failed to analyze the Supreme Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), that arbitrators decide challenges seeking revocation of an *entire contract*, or were distinguishable under *Prima Paint* because they involved stand-alone arbitration clauses rather than clauses embedded in larger contracts. But the panel's use of *Prima Paint* to overrule or diminish these cases was in error. *Prima Paint* addressed an entirely different question–whether the

court or an arbitrator decides allegations of fraudulent inducement that do not relate to the validity of an arbitration clause–and therefore is irrelevant to the challenges to the validity of the arbitration clauses here and in the cases discussed herein.

Second, this appeal involves an issue of exceptional importance. The question for *en banc* review is whether a party who challenges as unconscionable a national corporation's mandatory arbitration clause that forces her to travel over 3,000 miles and pay at least $6,500 in fees to arbitrate *must resolve this challenge in arbitration* because some of her procedural unconscionability allegations apply both to the arbitration clause and to other parts of the company's contract. This issue is critical because, if the panel's holding that Ms. Nagrampa has to arbitrate these allegations stands, then companies hereafter can evade judicial scrutiny and enforce abusive arbitration clauses that prevent franchise owners, workers, and customers from ever enforcing their statutory rights. They would just have to put these clauses in broader non-negotiable contracts and then claim that any allegations of unconscionability based in part on the company's overwhelming bargaining power go to the whole contract, and therefore must be arbitrated. Thus, for example, Circuit City could bind its store clerks to the very arbitration clause this Court struck down as unconscionable in *four different cases* just by adding *more* non-negotiable terms to its contract.

Although this Court often has recognized that binding pre-dispute mandatory

arbitration clauses are generally enforceable, it also has not refrained from striking down extremely unfair, one-sided clauses that abused the arbitration process. The panel decision here threatens to eliminate the role courts play in protecting people against the abusive clauses that go too far. Under the panel's holding, a company can shield even the most substantively outrageous arbitration clause from judicial review just by embedding it in a generally adhesive contract. The panel's approach means that a party's allegations that a company's arbitration clause forced her to travel thousands of miles and pay prohibitive fees can only be resolved through arbitration *under these very conditions she is challenging*. This will effectively eliminate a party's ability to challenge these requirements and to vindicate her underlying claims. The Court should grant *en banc* review to reverse the panel's holding and reassert the critical role that courts must play in protecting our citizens against abusive mandatory arbitration schemes.

STANDARD FOR REHEARING *EN BANC*

Under Federal Rule of Appellate Procedure 35 and Circuit Rule 35-1, a majority of the circuit judges in regular active service may order that an appeal be heard or reheard *en banc* where:

> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

FRAP 35(a). Here, the uniformity of this Court's decisions is threatened because the panel decision directly conflicts with *Ticknor*, *Adams*, *Ferguson*, *Ting*, *Ingle*, and *Mantor*, and would effectively overrule or nullify these decisions.

A three-judge panel does not have the authority to overrule or set aside a prior Ninth Circuit decision. Instead, "only the court sitting en banc may overrule a prior decision of the court." *Morton v. DeOliviera*, 984 F.2d 289, 292 (9th Cir. 1993). The sole exception is where "an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point." *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992). Here, the only Supreme Court decision cited by the panel in derogation of *Ticknor, et al.* was *Prima Paint*, which was decided in 1967, more than 30 years *before* any of this Court's decisions holding that an arbitration clause is unconscionable even where some allegations of procedural unconscionability also relate to the whole contract. Thus, *Prima Paint* is not intervening authority and is not on point as to the allegations of unconscionability directed at the arbitration clauses in this case and in *Ticknor*, *Adams*, *Ferguson*, *Ting*, *Ingle*, and *Mantor*. The Court therefore should grant *en banc* review and reverse the panel's holding that Ms. Nagrampa must arbitrate her allegations that the arbitration clause is unconscionable.

ARGUMENT

I. The Panel Decision Conflicts With Six Earlier Ninth Circuit Decisions.

To establish how the panel decision conflicts with a long line of this Court's decisions, a brief examination of the plaintiff's arguments and the governing legal framework is necessary. Ms. Nagrampa has argued throughout this case that defendant Mailcoups' mandatory arbitration clause, *not* its entire franchise contract, is unenforceable because it is unconscionable under California contract law. As this Court often has held, "in California, a contract or clause is unenforceable if it is *both* procedurally and substantively unconscionable." *See, e.g.*, *Ting*, 319 F.3d at 1148 (citing *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000), and *Adams*, 279 F.3d at 893) (emphasis added). Both elements must be present for a provision to be held unconscionable, although they need not be present to the same degree. *Id.* The procedural element of unconscionability addresses "the equilibrium of bargaining power between the parties and the extent to which the contract clearly discloses its terms," while the substantive element addresses "whether the terms of the contract are unduly harsh or oppressive." *Adams*, 279 F.3d at 893. Thus, a contract provision is unconscionable where "one party lacks meaningful choice in entering a contract or negotiating its terms *and* the terms are unreasonably favorable to the other party." *Mantor*, 335 F.3d at 1105 (emphasis added).

Ms. Nagrampa's allegations challenging Mailcoups' arbitration clause followed these formulations. She alleged substantive unconscionability based on the clause's harsh and one-sided requirements that she travel over 3,000 miles from California to Boston, pay at least $6,500 in forum costs, and arbitrate before a service with a built-in incentive to favor Mailcoups because it is paid on a per-case basis for cases arising under the company's franchise contracts. *See* Brief of Appellant at 17-39. It is hard to imagine allegations any more closely tied to the arbitration clause itself. She alleged procedural unconscionability based on surprise and oppression because the arbitration clause's cost requirements were incorporated by a mere reference to the arbitration rules, the clause appeared on the 25th page of a densely worded contract, and Mailcoups' overwhelming bargaining power and ability to dictate these terms made the arbitration clause, like the whole franchise agreement, a contract of adhesion. *See id.* at 14-17; *cf. Ingle*, 328 F.3d at 1171 ("Because of the stark inequality of bargaining power between Ingle and Circuit City, we conclude that Circuit City's 1998 arbitration agreement is also procedurally unconscionable.").

In its decision, the panel did not even address Ms. Nagrampa's substantive unconscionability allegations before ordering her to arbitrate 3,000 miles away in Boston at a cost of at least $6,500. Instead, the panel focused on only one part of her procedural unconscionability argument before invoking *Prima Paint* and holding that

"the arbitrator must decide whether an agreement that contains an arbitration clause is a contract of adhesion because this issue pertains to the making of the agreement as a whole and not to the arbitration clause specifically." Opinion at 3388.

This holding misconstrued Ms. Nagrampa's arguments and, consequently, misapplied *Prima Paint* and abrogated at least six of this Court's decisions. First, the adhesion argument does not challenge "the making of the agreement as a whole." It is one part of a multi-faceted challenge to the making and validity of the arbitration clause alone. Since California law requires evidence of *both* procedural and substantive unconscionability to invalidate a contract provision and since Ms. Nagrampa's allegations of substantive unconscionability and her other allegations of procedural unconscionability are aimed solely at Mailcoups' arbitration clause, *all* of her arguments implicate only the validity of this clause. Ms. Nagrampa never challenged the validity of the entire franchise agreement and, if a court were to adopt her contract of adhesion argument, *that would not invalidate the franchise agreement because* ***a mere allegation of adhesion is not grounds for invalidating a contract.***[1] The fact that one part of her procedural unconscionability allegations could also apply

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[1] *See Mantor*, 335 F.3d at 1105 ("Unconscionability exists when one party lacks meaningful choice *and* the terms are unreasonably favorable to the other party.") (emphasis added); *cf. Ticknor*, 265 F.3d at 940 ("The fact that a contract is one of adhesion is not dispositive under Montana law.").

to other parts of the company contract is irrelevant to the fact that her arguments challenge the validity of the arbitration clause. *Cf. Stenzel, v. Dell, Inc.*, __A.2d__, 2005 WL 674857 (Me. March 15, 2005) (Under *Prima Paint*, "the question of whether the arbitration clause is illusory was properly considered by the trial court even though the question necessarily blends into the larger question of whether the entire agreement is illusory.").[2] Therefore, *Prima Paint*'s holding that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, "does not permit the federal court to consider claims of fraud in the inducement of the contract generally," 388 U.S. at 404, has no application here.

Instead, Ms. Nagrampa's allegations are governed by *Prima Paint*'s separate holding that, "in passing upon a [9 U.S.C. § 3] application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404. Contrary to the panel's finding, Ms. Nagrampa's argument that the arbitration clause is substantively and

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See also A.T. Cross Co. v. Royal Selangor(s) PTE, Ltd., 217 F. Supp. 2d 229, 234 (D.R.I. 2002) (Under *Prima Paint*, "[i]t does not matter . . . that plaintiff's challenge could also apply to the existence of the entire contract. If the arbitration clause is severable so that it can be determined to be valid when the contract may not be, the arbitration clause must similarly be severable, for the purposes of pleading, when the arbitration clause may be invalid, but other terms of the contract may or may not apply to the parties' relationship.")

procedurally unconscionable based on its harsh and one-sided terms, its inadequate disclosure of these terms, and the non-negotiable nature of these terms as part of a generally adhesive contract all relate to the making and validity of the arbitration clause itself. Therefore, they must be resolved by a court under *Prima Paint*.

In so misconstruing Ms. Nagrampa's arguments and misapplying *Prima Paint*, the panel's decision conflicts with and effectively abrogates at least a half-dozen of this Court's decisions holding that courts must resolve identical unconscionability allegations. First, in *Ticknor*, this Court struck down a company's mandatory arbitration clause in a hotel franchise contract as unconscionable under Montana contract law based on its findings that the clause was non-negotiable as part of a contact of adhesion and that the clause's one-sided terms requiring arbitration of the Montana franchisee's claims in Maryland while allowing the company to litigate its own claims in court were unreasonable and oppressive. *Ticknor*, 265 F.3d at 939-40. The Court made this determination as to the validity of the arbitration clause itself, rather than force the Montana franchise owner to arbitrate across the country in Maryland to find out whether this arbitration requirement was unconscionable.

Recognizing that the arguments resolved by the Court in *Ticknor* were identical to those made by Ms. Nagrampa here, the panel attempted to distinguish the cases by claiming that *Ticknor* "provides no analysis of whether a court or an arbitrator should

properly decide the contract-of-adhesion question," and therefore "does not inform our inquiry in this case." Opinion at 3386. This attempted distinction fails, however, because *Ticknor* squarely addressed *Prima Paint* in holding that:

> [T]he role of the federal courts in these circumstances is limited: the sole question is whether the arbitration clause at issue is valid and enforceable under § 2 of the Federal Arbitration Act. In making this determination, federal courts may not address the validity or enforceability of the contract as a whole. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967).

Ticknor, 265 F.3d at 937. The panel's decision here holding that an arbitrator rather than a court must resolve unconscionability allegations identical to those decided by this Court in *Ticknor* thus creates a direct conflict of authority within this Circuit. *En banc* review under Federal Rule 35 and Circuit Rule 35-1 is therefore warranted.

In addition to *Ticknor*, the panel's decision conflicts with at least five other decisions of this Circuit that the panel could not meaningfully distinguish. The panel attempted to distinguish this Court's holdings in *Ferguson* and *Circuit City v. Adams* (and, presumably, *Ingle v. Circuit City* and *Circuit City v. Mantor*) striking two employers' mandatory arbitration clauses as unconscionable on similar grounds to those raised here by emphasizing the fact that those cases involved "stand-alone arbitration agreements, rather than arbitration clauses that were embedded in larger contracts." Opinion at 3386 n.4. But this distinction is meaningless because the

presence of *other* non-negotiable contract provisions is *irrelevant* to whether the arbitration clause itself is adhesive (and inadequately disclosed and substantively unconscionable). So long as the elements of unconscionability apply to the arbitration clause, the fact that they may also apply to other contract provisions should not prevent a court from evaluating the arbitration clause's validity.[3]

Even if the panel's decision does not explicitly overrule *Adams*, *Ferguson*, *Ingle*, and *Mantor*, it so trivializes their holdings as to effectively abrogate them. In all four cases, the Court itself (not an arbitrator whose authority is limited by the company contract's terms) held that an employer's mandatory arbitration clause was unconscionable because its substantive terms imposed burdensome costs on workers and stripped them of statutory remedies and because its procedural formation was marked by a massive imbalance in bargaining power that made the clause adhesive. *See Adams*, 279 F.3d at 893-94; *Ferguson*, 298 F.3d at 784-87; *Ingle*, 328 F.3d at 1172-79; *Mantor*, 335 F.3d at 1106-09. But under the panel's holding in the instant case, the Court could never have reached these issues if Circuit City or Countrywide had just included *other non-negotiable provisions* in their employment contracts and

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[3] By holding to the contrary, the panel creates a perverse incentive for companies by allowing them to enforce their adhesive and one-sided arbitration clauses if their contracts contain *more procedurally unconscionable provisions*. The panel seems not to have contemplated this incentive anywhere in its opinion.

then argued that the procedural unconscionability allegations based on adhesion were challenges to the entire contracts and therefore *must be arbitrated*. In that case, Circuit City and Countrywide (just like Mailcoups here) could have enforced their mandatory arbitration clauses imposing the same or even more prohibitive cost or travel obligations and stripping away statutory remedies from individual claimants before a court could assess their validity. The panel's decision thus would effectively abrogate the protections this Court recognized in these cases for workers and other claimants embroiled in disputes with powerful corporations.

Finally, the panel's decision conflicts with this Court's decision striking down the mandatory consumer arbitration clause in *Ting v. AT&T*. In *Ting*, the Court addressed an arbitration clause that AT&T imposed as part of its new Customer Service Agreement ("CSA") after federal deregulation of long distance telephone service took effect. *Ting*, 319 F.3d at 1132-33. The *Ting* decision affirmed a district court's holding that AT&T's consumer arbitration clause was unconscionable in part because "AT&T imposed the CSA on its customers without opportunity for negotiation," and because of its substantive terms imposing prohibitive cost obligations on certain claimants, stripping consumers of damages remedies, barring class claims, and mandating sweeping secrecy restrictions. *Id.* at 1149-52. In *Ting*, just as in *Ticknor*, the Court resolved procedural unconscionability allegations that

related both to the arbitration clause and to the entire company contract. The panel's decision in this case effectively overrules that part of *Ting* by holding that these types of allegations cannot be decided by a court. Instead, AT&T's customers would have to go to arbitration one at a time (not as a class) under the veil of secrecy and each would have to pay the prohibitive costs under AAA's Commercial Rules in order to find out whether these requirements are unconscionable. Since few if any consumers could ever afford to do this, the panel's decision effectively abrogates the protections for consumers recognized in *Ting*.

Because the panel's decision directly conflicts with and undermines this Court's holdings in *Ticknor*, *Adams*, *Ferguson*, *Ting*, *Ingle*, and *Mantor* applying state unconscionability law to protect franchise owners, workers, and consumers against abusive mandatory arbitration schemes, the Court should grant a rehearing *en banc* to resolve this intra-circuit conflict.

II. The Panel Decision Involves an Issue of Enormous Significance for Individual Litigants Facing the Loss of Their Access to the Court System.

In holding that the Court could not even decide Ms. Nagrampa's argument that Mailcoups' mandatory arbitration clause is unconscionable before ordering her to arbitrate, the panel placed considerable weight upon what it described as "the general congressional policy that arbitration should be 'speedy and not subject to delay and obstruction in the courts.'" Opinion at 3385 (quoting *Prima Paint*, 388 U.S. at 404).[4] Although the desire to usher cases out of court and into arbitration as quickly as possible certainly would explain the panel's decision, this does not justify the havoc this decision will wreak for franchise owners, workers, and consumers who face abusive mandatory arbitration systems imposed by powerful corporations.

The panel's decision forces parties to arbitrate whenever part of an allegation challenging the validity of an arbitration clause could also apply to other provisions in the same contract. Here, because the part of Ms. Nagrampa's procedural

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[4] This case is not the first time a member of this panel tried to paint as *obstructive* a party's arguments opposing an abusive arbitration clause and seeking to preserve his or her right of access to the civil justice system. *See Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1271 (9th Cir. 2005) (Bea, J., dissenting) ("The kernel of truth in this case is that Al-Safin is so desirous to litigate in federal district court rather than to arbitrate, that he refuses to accept the substantial concessions that Circuit City made when it promulgated its new [arbitration clause] relative to the [clause] that obtained and which were within her reach when his employment was terminated in 1998.")

unconscionability argument alleging overwhelming bargaining power also is true of other terms in the company contract, she must perform under the clause by traveling 3,000 miles to Boston and paying at least $6,500 in fees to obtain a decision by an arbitrator on whether these requirements (and the alleged bias of the service employing the arbitrator) render the clause unconscionable and thus unenforceable. Since Ms. Nagrampa cannot bear these burdens because her franchise nearly bankrupted her, she will have no recourse but to abandon her statutory claims and her defenses against Mailcoups' debt collection actions. If allowed to stand, the panel decision ordering Ms. Nagrampa to arbitrate her challenges to the prohibitive terms of the company's arbitration clause will extinguish her statutory rights.

Despite the panel's attempt to suggest otherwise, this decision compels exactly the same result in cases brought by less sophisticated consumers and employees with even less bargaining power than Ms. Nagrampa had here.[5] When consumers or workers face a non-negotiable arbitration clause that imposes prohibitive cost or travel requirements and strips them of legal remedies as in *Ticknor*, *Adams*, *Ferguson*, *Ting*, *Ingle*, and *Mantor*, this panel's misapplication of the *Prima Paint* rule would

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[5] The panel focused some energy on the idea that Ms. Nagrampa, as a franchisee, was a businesswoman and thus should be held to any contract she signed. Opinion at 3389. This is exactly opposite the approach this Court took to the franchisee dispute in *Ticknor*.

force them to arbitrate under these prohibitive conditions because their procedural unconscionability allegations would apply both to the arbitration clause and to other provisions in the same contract. *See, e.g., Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 n.3 (5th Cir. 1996) (Title VII sex discrimination case cited by panel as support for holding that Ms. Nagrampa must arbitrate her unconscionability claims). All of those cases, like almost any imaginable consumer or individual employment case, involved just such allegations that a company was exerting overwhelming bargaining power. The panel's decision therefore will cause untold thousands of workers and consumers to lose not just their right of access to the court system, but also their ability to vindicate their federal and state statutory rights in *any* forum.

In addition to creating these enormous dangers for individual litigants, the panel's decision forcing Ms. Nagrampa to arbitrate her allegations that the arbitration clause is unconscionable conflicts with numerous federal circuit and state supreme court decisions where the courts resolved identical allegations. *See, e.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 266 (3d Cir. 2003) (finding arbitration clause procedurally unconscionable based on pressure employer asserted in making contract containing the clause a condition of hiring and employment); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 983-84 (Cal. 2003) (same); *Burch v. Second Judicial Dist. Ct. of Nevada*, 49 P.3d 647, 650 (Nev. 2002) (finding clause in home builder's warranty

procedurally unconscionable where consumers lacked sophistication, had no chance to read warranty, and thus "did not have a meaningful opportunity to decide if they wanted the HBW's terms, including its arbitration provision").[6] The conflict between the panel's decision and these rulings from other federal and state appellate courts further demonstrates the need for *en banc* review. *See* Circuit Rule 35-1 (conflict with existing opinion by another court of appeals is grounds for rehearing *en banc*).

In light of the panel decision's enormous implications for individual litigants of all stripes and the direct conflict with prior decisions by this and other courts of appeal, this decision undoubtedly implicates "questions of exceptional importance" that warrant *en banc* review under Federal Rule 35(b)(1)(B) and Circuit Rule 35-1.

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But see Rojas, 87 F.3d at 749 n.3 (finding employee's claim that arbitration clause is unconscionable to implicate making of the entire contract, and thus ordering her to arbitrate); *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (payday loan borrowers' allegation that they lacked bargaining power and were unable to negotiate terms is for arbitrator to decide under *Prima Paint*); *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 170 (2d Cir. 2004) ("Claims of unconscionability and adhesion contracts are similarly included within the *Prima Paint* rule. Accordingly, JLM's claim that the ASBATANKVOY is a contract of adhesion is an issue for the arbitral panel to decide.") (citation omitted).

CONCLUSION

The panel's decision conflicts with or effectively abrogates this Court's prior decisions in *Ticknor*, *Adams*, *Ferguson*, *Ting*, *Ingle*, and *Mantor*. Moreover, this conflict involves issues of enormous significance implicating the ability of franchise owners, workers, consumers, and other individual litigants to access the court system and vindicate their federal and state law rights. For all of the reasons stated herein, the Court should grant the Petition for Rehearing or Suggestion for Hearing *En Banc*.

Dated: April 4, 2005

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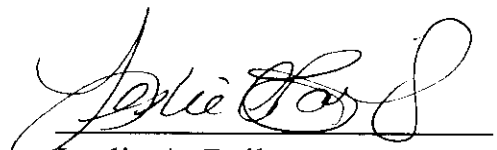
CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 40-1, I hereby certify that the attached Petition of Appellant for Rehearing and Suggestion for Hearing *En Banc* is proportionately spaced, has a typeface of 14 points or more and contains 4,131 words.



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CERTIFICATE OF SERVICE

I, Leslie A. Bailey, do hereby certify that a true and correct copy of the within **PETITION OF APPELLANT FOR REHEARING AND SUGGESTION FOR HEARING *EN BANC*** has been served on all counsel of record listed below by first class mail, postage prepaid, this 4th day of April, 2005:

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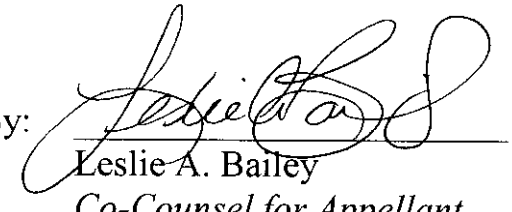
By: 
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RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR HEARING *EN BANC*

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SUMMARY OF ARGUMENT

Appellant Connie Nagrampa ("Nagrampa"), in her petition for rehearing or *en banc* review, provides a misleading analysis of both the facts of this dispute and the legal precedent that she claims supports her request. As set forth below, she fails to establish that the Panel's decision is incorrect or that there is any basis for a rehearing or *en banc* review. The Panel ruled against Nagrampa on her procedural unconscionability arguments that were directed specifically at the arbitration provision and found that her arguments that attacked the agreement as a whole needed to be decided by the arbitrator. (Opinion at 3388-89).

Nagrampa relies primarily on cases where courts questioned the validity of mandatory arbitration clauses in agreements between large corporations and either employees or consumers. Nagrampa was neither an employee nor a consumer. Rather, the undisputed evidence presented to the District Court and the Panel established that she was a sophisticated business woman, earning a six figure income for a competitor of Appellee MailCoups, Inc. ("MailCoups") at the time she entered her franchise agreement (the "Agreement"). Based on this record, the Panel correctly concluded that "Nagrampa—an experienced businessperson who had worked for more than seven years in the direct marketing field—had ample opportunity to read the arbitration clause and to consider its implications." (Opinion at 3389).

Additionally, in stark contrast to the cases upon which she relies, Nagrampa participated in the arbitration for almost a year, including conducting discovery in the arbitration and even attempting to file a counterclaim against MailCoups in the arbitration. It was only after several adverse rulings during the arbitration that she claimed for the first time that she was not going to participate and filed her complaint.

Further, Nagrampa attempts to distinguish *Prima Paint*, and the other cases from various circuits relied upon by the Panel, by boldly claiming in her Petition for rehearing that "Ms. Nagrampa never challenged the validity of the entire franchise agreement . . ." (Petition at p. 7). This claim directly contradicts the position that she took in the District Court. Her District Court complaint alleges fraud in the inducement of the franchise agreement. In opposing MailCoups' motion to compel arbitration, Nagrampa stated "Here, Ms. Nagrampa's entire contract was obtained by fraud and therefore should be revoked." [Appellant's Excerpts of Record "ER" at 89.] She cannot take a directly contrary position now that both the District Court and the Panel ruled unanimously against her.

Finally, even if the Panel's reasons for affirming the District Court were incorrect, the decision to affirm is correct. This case involves a garden variety arbitration clause in a commercial contract between two sophisticated parties. The arbitration provision is mutual and contains no limits on either parties' remedies or

damages. The fact that the arbitration provision requires that the arbitration take place in Boston, before the AAA, is not a sufficient basis to find the clause unconscionable. A ruling in favor of Nagrampa in this case would call into question the enforceability of any arbitration clause, in a commercial context or otherwise, that contained a contractual choice of venue or specified an arbitration provider. Such a ruling would be unprecedented and would be contrary to the strong public policy in favor of arbitration.

STATEMENT OF KEY FACTS

I. Nagrampa was a Sophisticated Business Woman

On August 24, 1998, Nagrampa, who had been earning over $100,000 annually in income from her position as a Sales Manager at ValPak, entered into a franchise agreement with MailCoups ("Agreement"). [ER 48; ER 93, ¶ 2-3.] According to her, MailCoups heavily recruited her, including company representatives approaching her several times and encouraging her to become a MailCoups' franchisee. [ER 93, ¶ 4.]

II. The Arbitration Clause is Mutual and Fair

In Article 35 of the Agreement, under the heading "**DISPUTE RESOLUTION,**" there is an arbitration clause entitled "**Arbitration**." The arbitration clause states, in pertinent part:

> Any controversy or claim arising out of or relating to this Agreement, . . . shall be submitted to arbitration before and in accordance with the rules of

> the American Arbitration Association or successor organization. Provided, however, that this clause shall not be construed to limit MailCoups' right to obtain any provisional remedy, including, without limitation, injunctive relief from any court of competent jurisdiction, as may be necessary in MailCoups' sole subjective judgment, to protect its Service Marks and proprietary information. . . . The situs of the arbitration proceedings shall be the regional office of the American Arbitration Association which is located in Boston, Massachusetts. The costs of arbitration shall be borne equally by MailCoups and Franchisee. Each party shall be responsible for the fees and expenses of its respective attorneys and experts.

[ER 72-73, ¶ 35.1.]

On page 29 of the Agreement, Nagrampa affirmed that she had read the Agreement: "I declare under penalty of perjury that I have read the foregoing Agreement and hereby accept and agree to each and all of the provisions, covenants and conditions thereof." [ER 76.]

III. Nagrampa Participated in MailCoups' Arbitration

In December 2001, MailCoups filed a Demand for Arbitration against Nagrampa seeking damages in the amount of $81,684.62 which Nagrampa owed to MailCoups under the Agreement. [ER 45, ¶ 5.] Nagrampa participated in the arbitration proceedings before the AAA for nearly a year, before filing her complaint against MailCoups in November 2002. Nagrampa's participation in the arbitration proceedings included: (1) filing motions with the AAA to challenge the venue of the arbitration[1]; (2) participating in at least three telephone conference

[1] MailCoups originally filed the arbitration in Los Angeles, which is in Nagrampa's home state. It was only after Nagrampa filed repeated challenges to Los Angeles as a venue that the AAA decided to strictly enforce the Agreement

hearings with the AAA and the arbitrator, some of which involved substantive issues; (3) corresponding with the AAA; (4) conducting discovery; and (5) attempting to file a counterclaim against MailCoups. [MailCoups' Supplemental Excerpts of Record "Supp. ER" 40-43; Supp. ER 45-47; ER 45-46, ¶ 8.][2]

IV. The District Court's Analysis of Nagrampa's Claims

In response to Nagrampa's complaint, MailCoups filed a motion to compel arbitration or to dismiss Nagrampa's complaint. The District Court conducted a thorough analysis of Nagrampa's unconscionability claims and on April 7, 2003 entered its Order granting MailCoups' Motion to dismiss. [ER 151-162.] The District Court ruled that the arbitration clause was not unconscionable. "Because the parties have a valid and enforceable agreement to arbitrate, and because such agreements should be enforced according to their terms, the proper forum for the dispute raised in [Nagrampa's] complaint is arbitration, not the district court." [ER 162:8-10.]

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and order the final hearing to take place in Boston. [ER 45-46, ¶¶ 6-9.]

[2] Although not decided by either the District Court or the Panel, the decision to dismiss Nagrampa's complaint was alternatively proper on the basis of waiver. Where a party voluntarily participates in arbitration proceedings over a period of several months without objecting to the arbitration, the party waives any right to object to the legitimacy of the arbitration proceedings. *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983); *see ConnTech Dev. Co. v. Univ. of Conn. Ed. Props., Inc.*, 102 F.3d 677, 685 (2d Cir. 1996) ("An objection to the arbitrability of a claim must be made on a timely basis, or it is waived.").

ARGUMENT

I. Standard For Rehearing

Under Federal Rule of Appellate Procedure 35(a) "a hearing or rehearing *en banc* is not favored and will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." FRAP 35(a).

Here, Nagrampa argues that an *en banc* hearing is necessary to preserve the uniformity of this Court's decisions in at least six cases and "would effectively overrule or nullify these decisions." [Petition p. 4.] Contrary to Nagrampa's arguments, and as discussed in more detail below, the Court's decision is consistent with the prior decisions and the Court's reliance on *Prima Paint* was entirely appropriate.

Further, Nagrampa has failed to establish that the proceeding involves a question of exceptional importance. The Panel's decision does nothing more than confirm the existing rule that in a commercial transaction, an arbitrator is the proper person to decide whether a contract containing an arbitration clause is a contract of adhesion. Nagrampa claims that the decision is of exceptional importance by positing conspiracy theories about how companies emboldened by this decision will purposely add unconscionable terms to their contracts to avoid court review. Nagrampa also assumes for purposes of her "exceptional

importance" argument that any individual litigant will have no chance of prevailing in an arbitration and therefore will have all of their legal rights taken away if they are forced to arbitrate. There is no support for either of these two theories.

II. The Panel's Decision Was Correct And Does Not Conflict with Earlier Ninth Circuit Decisions

The Court's application of and reliance on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) was entirely appropriate. The *Prima Paint* Court held that where an agreement contains an arbitration clause, a party's claim that it has been fraudulently induced into that agreement must be referred to an arbitrator unless the claim specifically pertains to the arbitration. *Prima Paint Corp.*, 388 U.S. at 403-04.

Nagrampa's complaint alleges that MailCoups' fraudulently induced her to enter into the Agreement. [ER 10.] This claim relates to the Agreement as a whole and not specifically to the arbitration provision. [*Id.*] Nagrampa confirmed that she was challenging the enforceability of the entire Agreement in her District Court opposition to MailCoup's motion to dismiss. "Here, Ms. Nagrampa's entire contract was obtained by fraud and therefore should be revoked." [ER 89.]

Further, in support of her unconscionability argument, Nagrampa has claimed that the entire Agreement is a contract of adhesion. "In this case, the contract is clearly one of adhesion." [Nagrampa Opening Brief at p. 15.] The unconscionability argument thus relates to the entire Agreement and not just the

arbitration provision. Under *Prima Paint,* the Panel correctly found that an arbitrator must decide this issue.[3]

The holding in *Prima Paint* has been applied by numerous other courts to claims that the contract at issue was a contract of adhesion and therefore unconscionable. *JLM Indus. Inc. v. Stolt-Nielsen SA,* 387 F.3d 163, 170 (2d Cir. 2004) ("According to the principal announced in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* the issues of whether the [parties' agreement]—as opposed to the arbitration clause alone—is a contract of adhesion is itself an arbitrable matter not properly considered by a court." (citation omitted)); *Harris v. Green Tree Fin. Corp.,* 183 F.3d 173, 179 (3d Cir. 1999) (holding that under *Prima Paint,* a court "must refer questions regarding the enforceability of the terms of the underlying contract to an arbitrator."); *Burden v. Check into Cash of Ky.,* 267 F.3d 483, n.3 (6th Cir. 2001) ("an additional claim of Plaintiffs, that the arbitration agreements are unenforceable because they were contained in contracts of adhesion, also does not concern the making of the arbitration agreements because the claim does not attack the arbitration clause, separate from the underlying loan agreements"); *Jenkins v. First Am. Cash Advance of Ga., LLC,* 400 F.3d 868, 877 (11th Cir. 2005) ("This Court has applied the *Prima Paint* rule to claims of adhesion and

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[3] Similarly, the District Court deferred a ruling on issues that attacked the Agreement as a whole, finding that such issues are "properly a matter for the arbitrator, not the courts." [ER 159:3-5.]

unconscionability. We have held that 'if . . . [the party's] claims of adhesion, unconscionability, . . . and lack of mutuality of obligation pertain to the contract as a whole, and not to the arbitration provision alone, then these issues should be resolved in arbitration.'"); *Harter v. Iowa Grain Co.,* 220 F.3d 544, 550 (7th Cir. 2000) (holding that "a federal court must order arbitration 'once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.'"'); *Madol v. Dan Nelson Auto Group,* 372 F.3d 997, 1000 (8th Cir. 2004) (determining that "[t]he magistrate judge also correctly noted that the 'plaintiffs' arguments [of invalidity] really go to the motor vehicle contracts as a whole, and not just the arbitration agreements,' and that precedent from this court and the Supreme Court requires that such arguments be submitted to arbitration."); *Rojas v. TK Communs.,* 87 F.3d 745, 749 (5th Cir. 1996) ("Because her claim [that the agreement is a contract of adhesion] relates to the entire agreement, rather than just the arbitration clause, the FAA requires that her claims be heard by an arbitrator."); *see also, Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co.,* 774 F.2d 524, 528 (1st. Cir. 1985) (holding that "under the Federal Arbitration Act, there must be an independent challenge to the making of an arbitration clause before a court may avoid granting an otherwise proper motion to compel arbitration.").

Nagrampa erroneously argues that the Panel's decision creates an "intra-circuit" conflict by implicitly if not explicitly overruling six prior decisions by this Court. The Panel correctly determined that the *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778 (9th Cir. 2002) and *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002) decisions dealt with stand-alone arbitration agreements requiring employees to unilaterally submit to arbitration as a condition of employment. The employee's challenge to the arbitration agreement was akin to a specific challenge to an arbitration provision of a contract under *Prima Paint* and thus a proper question for the court. These cases are far different than the present case which involves a commercial contract between two sophisticated parties and an arbitration provision that is part of a larger contract that Nagrampa is challenging in its entirety.

Nagrampa also cites two other employment cases: *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003) and *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) for the similar proposition that the Court's decision "so trivializes their holdings as to effectively abrogate them." [Petition, p. 11.] Both *Ingle* and *Mantor* involved stand-alone arbitration agreements that Circuit City employees were forced to sign in order to gain or maintain their employment with the company. The employee's claims of unconscionability specifically focused on these unilateral and stand-alone arbitration agreements as opposed to the

employment contract as a whole. There is no inconsistency between the Panel's decision and either of the above cases.

Nagrampa cites *Ting v. AT&T,* 319 F.3d 1126 (9th Cir. 2002) in support of her argument that the Panel decision conflicts with this Court's prior precedent. Nagrampa argues that in *Ting* the Court not the arbitrator resolved procedural unconscionability allegations that related both to the arbitration clause and to entire contract. Similar to the employees in *Ferguson, Adams, Ingle and Mantor,* the consumers in *Ting* were required to sign the mandatory arbitration provision in order to pay or use AT&T's service. In addition, the arbitration clause in *Ting* expressly prohibited, among other things class actions, contained damages limitations and required arbitration to remain confidential. The court in *Ting* was faced with complex questions of Federal Preemption under the Federal Communications Act. There was no mention of *Prima Paint* or the cases that followed it. The *Ting* decision does not apply to the present case because Nagrampa was not a consumer, but rather contracted with MailCoups in the commercial context of purchasing a franchise. Accordingly, contrary to Nagrampa's claims, the Panel's decision does not abrogate the protections for consumers in *Ting.*

Finally, Nagrampa argues that the Panel's decision is contrary to *Ticknor v. Choice Hotels, Int'l, Inc.,* 265 F.3d 931 (9th Cir. 2002), which was a majority

decision decided under Montana law. The Panel properly held that *Ticknor* was not informative on the issue of whether the arbitrator should decide the contract of adhesion question. Nagrampa is correct that the *Ticknor* Court cited the *Prima Paint* holding, however, as the Panel stated, other than citing *Prima Paint,* the *Ticknor* decision "provides no analysis of whether a court or an arbitrator should properly decide the contract-of-adhesion question." [Opinion at 3386.] *Ticknor* is also distinguishable, because in addition to being decided under Montana law, the arbitration provision at issue was not mutual and allowed the franchisor to file its claims in state or federal court, while the franchisee was forced to arbitrate. *Id.* at 940.

III. The District Court's Decision Was Correct

Assuming that the District Court and not the arbitrator was required to decide the issue of unconscionability, the District Court decision should still be affirmed, because the District Court did analyze the issue and rejected Nagrampa's unconscionability arguments.[4] For example, the District Court rejected Nagrampa's substantive unconscionability arguments, finding that "the arbitration

[4] Although the Panel found that the issue of whether the Agreement was a contract of adhesion was to be decided by the Arbitrator, it did provide a substantive ruling on Nagrampa's other procedural unconscionability arguments that were directed specifically at the arbitration clause. Specifically, the Panel rejected Nagrampa's claims that the arbitration clause was procedurally unconscionable because it was found on the twenty-fifth page of the Agreement and that she allegedly was not informed about the clause or the costs of arbitration. [Opinion at 3388.]

provision, . . . appears to be far from one-sided." [ER 156.] Rejecting Nagrampa's arguments that the arbitration provision shocks the conscience and that she could not receive a fair hearing before the AAA, the District Court held that "Plaintiff offers no competent evidence to support this contention, nor does she present authority to contradict case law finding that AAA is neutral. [ER 157-158.] The District Court concluded by finding that "Plaintiff's arguments against the enforcement of the arbitration provision are unpersuasive." [ER 159.]

IV. The Panel's Decision Does Not Impede Individual Litigant's Access to the Judicial System

Nagrampa's claim that the Panel's decision effectively extinguishes her legal rights is based upon the cynical, but unsupported, view that a non-corporation cannot get a fair hearing before an arbitrator. By making this claim, Nagrampa challenges not only the integrity of the AAA, but also the integrity of all of the attorneys, judges, court of appeal justices and supreme court justices who serve as arbitrators for the AAA and other arbitration providers. As the District Court found, the "Plaintiff offers no competent evidence to support this contention." [ER 157.]

While Nagrampa and her counsel may be opponents of arbitration in general, their view is directly contrary to the long stated public policy in both California and the United States in favor of arbitration. As the United States Supreme Court in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S.

1, 24 (1983) stated as a "matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25.

In the present case, which involved a commercial transaction between two sophisticated parties, there is simply no reason to invalidate the agreed upon arbitration clause. This is especially true here, where the arbitration clause is mutual and does not contain any limitations on Nagrampa's rights or remedies. The mere presence of a forum selection clause, setting the location of the arbitration in the home town of one of the parties, does not render an arbitration provision unconscionable.[5] "Forum selection clauses play an important role in

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[5] *See C.H.I. Inc. v. Marcus Brothers Textile, Inc.*, 930 F.2d 762, 763-64 (9th Cir. 1991) (affirming dismissal of case for failure to arbitrate according to arbitration clause designating New York as the place of arbitration); *OPE Int'l LP v. Chet Morrison Contractors, Inc.* 258 F.3d 443, 445, 448 (5th Cir. 2001) (holding that compelling parties to submit to arbitration in Houston, Texas pursuant to an arbitration agreement requiring arbitration in Houston was proper); *Webb v. Investacorp, Inc.*, 89 F.3d 252, 259 (5th Cir. 1996) (holding arbitration provision was not unconscionable where it required arbitration in a foreign venue); *G.C. & K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1108 (9th Cir. 2003) (affirming confirmation of arbitration award where arbitration was in Louisiana though franchise was in Hawaii); *Bradley v. Harris Ranch Inc.*, 275 F.3d 884, 886 (9th Cir. 2001) (reversing decision compelling arbitration in California rather than in Utah where franchise agreements required arbitration in Utah though franchises were in California); *Management Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 852-53 (6th Cir. 1997) (affirming decision to compel arbitration in Cleveland, Ohio though franchise was in Washington); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 790 (8th Cir. 1998) (affirming dismissal of case because parties had to arbitrate in Oklahoma where franchisee was a Missouri corporation).

both national and international commerce. Given the importance of forum selection clauses, both the United States Supreme Court and the California Supreme Court have placed a heavy burden on a plaintiff seeking to defeat such a clause . . . ." *Lu v. Dryclean-U.S.A. of California, Inc.*, 11 Cal.App.4th 1490, 1493 (1992).

CONCLUSION

Contrary to Nagrampa's contentions, the Panel's decision does not conflict with this Court's prior decisions nor is there any compelling reason to grant rehearing or *en banc* review. The Panel's decision is consistent with a long line of cases holding that the arbitrator must decide issues pertaining to the alleged adhesiveness of a contract as a whole. Additionally, there is ample basis to affirm the District Court's decision on the merits, as the District Court correctly found that the arbitration provision in the Agreement was enforceable. Accordingly, this Court should deny Nagrampa's Petition for Rehearing or *En Banc* Review.

Dated: April 27, 2005

Respectfully submitted,

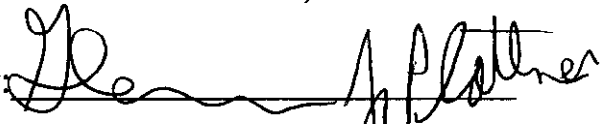
By _____
Glenn J. Plattner
Jenkens & Gilchrist, LLP
Attorneys for Defendant-Appellee
MAILCOUPS, INC.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. Pro. 32(a)(7)(C) and Ninth Circuit Rule 40-1, the attached Appellee's Response to Appellant's Petition for Rehearing and Suggestion for Hearing *En Banc* is proportionally spaced, has a typeface of 14 points and contains 3,772 words.

DATED: April 27, 2005

JENKENS & GILCHRIST, LLP

By: 

Glenn J. Plattner
Attorney for Defendant-Appellee
MAILCOUPS, INC.

CERTIFICATE OF SERVICE

I, Glenn J. Plattner, do hereby certify that a true and correct copy of the within **RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR HEARING *EN BANC*** has been served on all counsel of record listed below by first class mail, postage prepaid, this 27th day of April, 2005.

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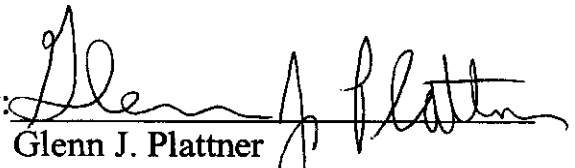
By: 
Glenn J. Plattner
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MAILCOUPS, INC.

Appeal No. 03-15955

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONNIE A. NAGRAMPA,

Plaintiff/Appellant,

vs.

MAILCOUPS, INC., AMERICAN ARBITRATION ASSOCIATION, AND DOES 1-25 INCLUSIVE,

Defendants/Appellees.

On Appeal from the Judgment of the United States District Court
for the Northern District of California, San Francisco
The Honorable Martin J. Jenkins, Judge Presiding
(Case No. CV 03-0208 MJJ ARB)

APPELLEE AMERICAN ARBITRATION ASSOCIATION'S RESPONSE TO APPELLANT NAGRAMPA'S PETITION FOR REHEARING AND SUGGESTION FOR HEARING *EN BANC*

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AMERICAN ARBITRATION ASSOCIATION

TABLE OF AUTHORITIES

Page(s)

CASES

The American Arbitration Association ("AAA") files the following response to the Court's April 7, 2005 order.

Petitioner erroneously named the AAA as a defendant. The law of the Circuit is that the AAA, like other arbitrators and other organizations that sponsor arbitration, are protected by arbitral immunity. *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579 (9th Cir. 1987).[1] Rule 48(b) of the AAA's rules states the applicable policy: "(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or a proper party in judicial proceedings relating to the arbitration."

As stated in its answering brief, the AAA, as a neutral and impartial administrative agency, takes no position on the enforceability of the arbitration agreement between Nagrampa and Mailcoups based on allegations of unconscionability. (Answering Brief, p. 1, fn. 1.)

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[1] Every other Circuit addressing the question has reached the same conclusion. N*ew England Cleaning Srvcs., Inc. v. American Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999); *Austern v. the Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882 (2d Cir. 1990); *Cahn v. International Ladies' Garment Union*, 311 F.2d 113 (3d Cir. 1962); *Radin v. United States*, 699 F.2d 681 (4th Cir. 1983); *Hawkins v. National Ass'n of Sec. Dealers*, 149 F.3d 330, 332 (5th Cir. 1998); *Corey v. New York Stock Dealers*, 691 F.2d 1205 (6th Cir. 1982); *International Med. Grp., Inc. v. American Arbitration Ass'n, Inc.*, 312 F.3d 833 (7th Cir. 2002); *Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 383 (8th Cir. 1996)

The issue which the AAA did address was Nagrampa's unsupported assertion that AAA proceedings are inherently biased. As to that issue, the AAA contended that the District Court correctly decided that Nagrampa's assertion of partiality lacked merit.

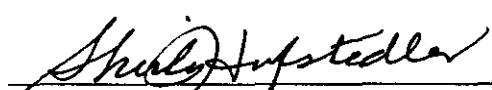
The Court's opinion does not address this issue and Nagrampa does not raise it in her petition for rehearing and suggestion for hearing *en banc*. Under the circumstances, the AAA does not now brief the merits of the Court's opinion affirming the trial court's dismissal order granting appellee Mailcoups, Inc.'s motion.

Dated: April 27, 2005

Respectfully submitted,

WARNLOF & SUMNICK
A Professional Law Association
John J. Warnlof

MORRISON & FOERSTER LLP
Shirley M. Hufstedler

By: 
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CERTIFICATE OF COMPLIANCE

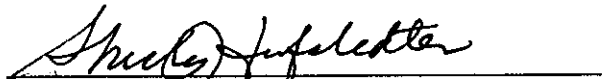
Pursuant to Ninth Circuit Rule 32-1, counsel for American Arbitration Association hereby certifies: The text of the brief is double-spaced, except for quotations and footnotes; the brief is a proportionately spaced font, no less than 14 point and contains 341 words.

Dated: April 27, 2005

Respectfully submitted,

WARNLOF & SUMNICK

MORRISON & FOERSTER LLP

By: 

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PROOF OF SERVICE

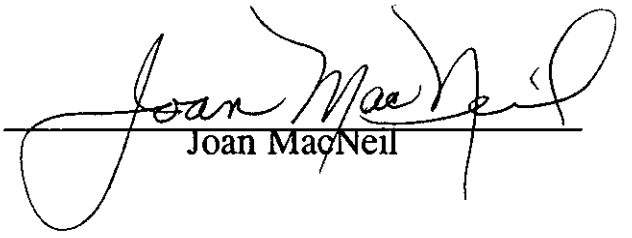
I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Morrison & Foerster LLP, 555 West Fifth Street, Suite 3500, Los Angeles, California 90013-1024. On April 27, 2005, I served the following documents:

APPELLEE AMERICAN ARBITRATION ASSOCIATION'S RESPONSE TO APPELLANT NAGRAMPA'S PETITION FOR REHEARING AND SUGGESTION FOR HEARING *EN BANC*

by placing a copy of the document listed above in a sealed envelope and sending it **UPS Next Day Air Service**, with delivery fees provided for, addressed to the person(s) indicated at that person'(s) last office address as shown on a recent document filed in the cause and served on Morrison & Foerster LLP by that person(s). I know that in the ordinary course of business at Morrison & Foerster LLP said document will be deposited in a box or other facility regularly maintained by **United Parcel Service** or delivered to an authorized courier or driver of **UPS** for next day delivery.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 27, 2005, at Los Angeles, California.



Joan MacNeil

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Clerk of the United States District Court Northern District of California San Francisco Division U.S. Courthouse 450 Golden Gate Avenue San Francisco, California 94102-3483 Attention: The Hon. Martin J. Jenkins	